

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMAD, WALID  
MUHAMMAD SALIH MUBARAK BIN  
'ATASH, RAMZI BIN AL SHIBH, ALI  
ABDUL-AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI

AE254VV(AAA)

Defense Motion to Compel Production of  
Evidence of Confinement Conditions at Camp  
Seven

5 February 2015

1. **Timeliness:** This motion is timely filed within the Trial Judiciary Rules of Court, Rule 3.7(b).<sup>1</sup>
2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission compel JTF-GTMO and any other relevant agency to produce a complete and unredacted set of all documents and information relating to Mr. al Baluchi's confinement conditions at Camp 7, including Standard Operating Procedures (SOPs), Temporary Standing Orders (TSOs), and building records.<sup>2</sup>
3. **Overview:** Mr. al Baluchi has requested discovery of materials relating to conditions of confinement at Camp 7. The prosecution has failed to produce any of the requested materials, including the SOPs, despite relying on them in the government's own pleadings.<sup>3</sup> Mr. al Baluchi therefore respectfully requests that the commission compel discovery at this time.
4. **Burden and Standard of Proof:** The burden of persuasion on this motion to compel discovery rests with the defense.

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<sup>1</sup> Mr. al Baluchi requests this motion to be heard in February 2015 pursuant to AE254RR Order, Government Motion for an Expedited Litigation Schedule.

<sup>2</sup> The relief sought here is greater in scope than that sought in AE328(WBA) Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status. This motion, for example, seeks historical SOPs and other documents as well as SOPs from 1 July 2014 forward. AE255(AAA) Defense Motion to Compel Discovery Regarding Recordings of Mr. al Baluchi addresses the fourth discovery item in AE328, "All audio or video recordings of Mr. bin 'Atash made at 'Camp 7' for the period 1 July 2014 to present." AE328 Att. B.

5. **Facts:**

a. On September 17, 2001, six days after the attacks of September 11, 2001, President George W. Bush signed a covert action Memorandum of Notification to authorize the Director of Central Intelligence to “undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities.”<sup>4</sup>

b. According to the recently-released redacted Executive Summary of the *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, Pakistani authorities arrested Mr. al Baluchi on 29 April 2003.<sup>5</sup>

c. On or before 2 May 2003, CIA officers were observing the foreign government interrogation of Mr. al Baluchi via video feed.<sup>6</sup>

d. In May 2003, Mr. al Baluchi was “rendered to CIA custody and immediately subjected to the CIA’s enhanced interrogation techniques.”<sup>7</sup> The *SSCI Executive Summary* does not describe which interrogation techniques the CIA used on Mr. al Baluchi, but generally

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<sup>3</sup> See, e.g., AE328A at 3; AE254 at 3-7.

<sup>4</sup> Senate Select Committee on Intelligence, *Executive Summary, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* 11 [hereinafter *SSCI Executive Summary*], S. Rep. 113-288 (Dec. 9, 2014), available at <http://www.intelligence.senate.gov/study2014.html> (contained in the record at AE254OO(Mohammad) Response to AE254KK Government Motion for an Expedited Litigation Schedule to Resolve AE254Y). The defendants have moved the military commission to order the government to provide this document, among others, in AE286 Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents.

<sup>5</sup> *SSCI Executive Summary* at 388 n. 2190. Counsel lacks sufficient information to confirm or deny this date. On 14 May 2013, Mr. al Baluchi requested the government to produce discovery regarding his initial detention in DR-035-AAA; the government responded that it would do so, but has not produced any report or narrative description of the circumstances of initial detention.

<sup>6</sup> *SSCI Executive Summary* at 243 n.1378. The government has not produced the cable (identified as 14291) the *SSCI Executive Summary* cites for this fact.

<sup>7</sup> *SSCI Executive Summary* at 244.

describes some of the torture and other cruel, inhuman, and degrading treatment the CIA inflicted as part of its program.<sup>8</sup>

e. Beginning in September 2003, the CIA held a number of detainees at three CIA facilities on the grounds of, but separate from, the U.S. military facilities at Guantanamo Bay, Cuba.<sup>9</sup> By April 2004, the CIA had transferred these men from Guantanamo Bay to other detention facilities out of fear that the Supreme Court of the United States might grant them the right to *habeas corpus*.<sup>10</sup>

f. Mr. al Baluchi remained in CIA custody until his transfer to Guantanamo Bay in September 2006.<sup>11</sup>

g. On September 6, 2006, in a speech based on CIA information and vetted by the CIA,<sup>12</sup> President George W. Bush announced the transfer of fourteen CIA detainees, including Mr. al Baluchi, to Guantanamo Bay, Cuba.<sup>13</sup> After the CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.<sup>14</sup> According to the *Miami Herald*, the

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<sup>8</sup> In remarks before the Committee Against Torture, the United States acknowledged its use of torture. See Opening Statement of Assistant Secretary Tom Malinowski, Committee Against Torture (Nov. 12, 2014), available at <https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/>. “Enhanced interrogation techniques” are not the only methods of abuse; some abusive techniques were defined as “standard interrogation techniques” or not defined at all.

<sup>9</sup> *SSCI Executive Summary* at 140 & n. 848. The *SSCI Executive Summary* refers to the three Guantanamo Bay CIA facilities as DETENTION SITE MAROON, DETENTION SITE INDIGO, and DETENTION SITE RED. *Id.*

<sup>10</sup> *SSCI Executive Summary* at 140-41.

<sup>11</sup> *SSCI Executive Summary* at 246.

<sup>12</sup> *SSCI Executive Summary* at 159.

<sup>13</sup> The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

<sup>14</sup> *SSCI Executive Summary* at 160. The United States has not declassified when, if ever, the CIA relinquished operational control of the men it held in secret detention.



CIA spokesperson has “declined to say when—if ever—the agency relinquished control of Guantanamo’s most secretive prison.”<sup>15</sup>

h. Admiral Walsh, following the completion of the 2009 Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement, commonly known as the Walsh Report, stated that conditions at Camp 7 were “effectively” the same as a “supermax facility.”<sup>16</sup>

i. On 2 August 2013, Mr. bin ‘Atash requested all SOPs governing Camp 7 detention staff in effect from 2006 to the present in DR-087-WBA.<sup>17</sup> Mr. al Baluchi does not know whether the government ever responded to this request.

j. On 19 March 2014, Mr. al Baluchi requested the following information from the government in DR-159-AAA:

Any documents or information describing conditions of confinement at Camp 7, including but not limited to the following:

- (a) Blueprints, line drawings, architect’s concept sketches, and/or as-built diagrams regarding the construction of the detainee areas of Camp 7;
- (b) Contracts regarding the construction of or the maintenance of the detainee areas of Camp 7;
- (c) Standard Operating Procedures (SOP) regarding treatment of Camp 7 detainees which have been in effect at any time since September 2006, including any policy governing transfer from Camp 7 to other facilities;

<sup>15</sup> Carol Rosenberg, *Senate report confirms CIA had ‘black site’ at Guantanamo, hid it from Congress*, *Miami Herald* (Dec. 11, 2014), available at [http://www.mcclatchydc.com/2014/12/11/249826\\_senate-report-confirms-cia-had.html?rh=1](http://www.mcclatchydc.com/2014/12/11/249826_senate-report-confirms-cia-had.html?rh=1).

<sup>16</sup> *Dep’t of Def. News Briefing with Vice Chief of Naval Operations, Adm. Patrick M. Walsh*, 23 February 2009, transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4359>.

- (d) Documents regarding the conditions of confinement at Camp 7, including any alleged mistreatment of Camp 7 detainees;
- (e) Documents or information regarding the certification of Camp 7 as a SCIF.<sup>18</sup>
- k. On 1 April 2014, the government responded as follows:<sup>19</sup>

**The Prosecution is currently conducting its due diligence with respect to the discovery request submitted on 19 March 2014. The Prosecution will respond accordingly upon completion of its due diligence.**

l. The government has not responded further to DR-159-AAA, or produced responsive discovery.

m. On 5 June 2014, Mr. al Baluchi moved to decline joinder to Mr. al Hawsawi's motion regarding conditions of confinement on the basis that "the issue is not yet ripe for presentation to the military commission."<sup>20</sup> Among other reasons, Mr. al Baluchi explained that, "the government is still conducting its due diligence with respect to a 19 March 2014 request for information about Mr. al Baluchi's current conditions of confinement."<sup>21</sup>

n. On 6 June 2014, Mr. al Baluchi requested additional discovery relating to Camp 7 conditions in DR-159A-AAA:

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<sup>17</sup> Attachment B (DR-087-WBA).

<sup>18</sup> Attachment C (DR-159-AAA). The quoted language is from an unclassified portion of DR-159-AAA.

<sup>19</sup> Attachment D.

<sup>20</sup> AE303(Mohammad, bin 'Atash, bin al Shibh, al Baluchi) Joint Motion to Decline Joinder of AE303(MAH) Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Standards at 1.

<sup>21</sup> *Id.* at 2.

Documents or information, including but not limited to memoranda, directives, or emails, regarding the segregation of so-called “high-value detainees” from other inmates at Guantanamo Bay Naval Station.<sup>22</sup>

o. On 12 June 2014, the government responded as follows:<sup>23</sup>

**The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.**

**Further, the Defense has access to the actual conditions of confinement of their client pursuant to the order of this Commission in AE 108J.**

**As such, the Prosecution respectfully declines to produce the requested material.**

p. On or about 8 October 2014, JTF-GTMO placed women in roles involving direct contact with detainees.

q. On 15 October 2014, in DR-187-WBA, Mr. bin ‘Atash requested discovery from the government regarding certain aspects of conditions of confinement at Camp 7, from 1 July 2014 to the present.<sup>24</sup> Mr. bin ‘Atash’s request includes a subset of the discovery this motion addresses.

r. On 12 November 2014, the government responded to Mr. bin ‘Atash’s discovery request DR-197-WBA in relevant part:<sup>25</sup>

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<sup>22</sup> Attachment E (DR-159A-AAA).

<sup>23</sup> Attachment F.

<sup>24</sup> AE328(WBA) Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status, Attachment B (DR-187-WBA).

<sup>25</sup> AE328(WBA), Attachment C.



**There are other documents that are responsive to your request that are classified and will be produced only after defense counsel have signed the Memorandum of Understanding Regarding the Receipt of Classified Information.**

s. On 19 November 2014, Mr. bin 'Atash moved the military commission to compel the government to produce the requested discovery in AE328(WBA).<sup>26</sup> Mr. al Baluchi joined the motion by operation of Rule of Court 3(5)(i).

t. On 2 December 2014, in responding to AE328(WBA), the government stated, "In conducting its due diligence, the Prosecution did identify an SOP that deals specifically with disciplinary policies and procedures for Camp VII, which is, in fact, classified at the SECRET//NOFORN level."<sup>27</sup> The government noted that, "The Prosecution eagerly awaits compliance with AE013DDD by the Defense so that it can swiftly provide not only the materials specifically requested by this filing, but all additional discovery signing the MOU would allow the Defense to receive, so that this case can finally begin to proceed."<sup>28</sup>

u. On 5 December 2014, Mr. al Baluchi filed a reply<sup>29</sup> on the basis his counsel has signed the MOU at issue on two separate occasions, with the first being over 18 months ago. However, the prosecution has not propounded any of the SOPs, or the "additional documents" cited in their response, to counsel for Mr. al Baluchi.

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<sup>26</sup> AE328(WBA).

<sup>27</sup> AE328A Government Response to Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status at 3.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> AE328B(AAA).

**6. Law and Argument****A. Mr. al Baluchi is entitled to discovery which is relevant and material to a challenge to the current conditions of confinement at Camp 7.**

Mr. al Baluchi is entitled to discovery which is material to challenge the administration and application of those standards to his current confinement conditions. The government's inhumane treatment of Mr. al Baluchi has continued for eight years at Camp 7 in Guantanamo, and by all indications has never met the minimum standards required under domestic and international law.

The government obviously possesses the SOPs, TSOs, and other materials relating to conditions of confinement. SOPs and TSOs are by their very nature intended for widespread distribution throughout JTF-GTMO, and the prosecution has relied heavily on these documents in their own filings, including its defense of JTF-GTMO's October 2014 order for female guards to touch the detainees.<sup>30</sup> Other materials relating to conditions of confinements, such as documented allegations of abuse, are clearly part of the traditional operation of any American detention facility, whether civilian or military.<sup>31</sup>

By contrast, the defense has access to information about Mr. al Baluchi and other detainees' conditions of confinement only through detainee statements and outdated third-party reports. The defense requires accurate and complete access to evidence regarding Mr. al Baluchi's conditions of confinement in order to challenge those specific policies and procedures which fail to meet domestic and international standards.

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<sup>30</sup> See, e.g., AE328A at 3; AE254EE at 3-7.

<sup>31</sup> Further, assuming that some form of internal review at JTF-GTMO exists, as required by Articles 12 & 13 of the Convention Against Torture, such documentation would be required in order to investigate allegations of detainee abuse.



Mr. al Baluchi is currently detained under international humanitarian law (IHL), also known as the law of war or law of armed conflict,<sup>32</sup> as a civilian internee charged with war crimes. Mr. al Baluchi and his co-defendants are guaranteed specific rights during their detention under the Eighth Amendment and the Fourth Geneva Convention, as recognized by current U.S. policy, as well as other elements of IHL and International Human Rights Law (IHRL), to all civilian detainees in an occupied territory.<sup>33</sup> Mr. al Baluchi's conditions of confinement are within the jurisdiction of the military commission and ripe for review,<sup>34</sup> as stated previously in Mr. al Baluchi's Reply in AE321C (AAA).<sup>35</sup>

At present, multiple motions have been filed by Mr. al Baluchi and other detainees relating to family and telephonic contact,<sup>36</sup> medical care,<sup>37</sup> and invasive searches,<sup>38</sup> as well as an overarching challenge to confinement conditions.<sup>39</sup> Most currently, the defendants have challenged JTF-GTMO's order for female guards to touch the detainees.<sup>40</sup> In all pending motions regarding the Camp 7 detainees' conditions of confinement, the burden of proof rests with the defense. Mr. al Baluchi and his codefendants have requested discovery of evidence

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<sup>32</sup> See, e.g., United Nations Committee Against Torture, Periodic Report of the United States of America, at paras. 26 & 40 (official responses to questions 5 & 8) (2013), available at <http://www.state.gov/documents/organization/213267.pdf>.

<sup>33</sup> The application of Fifth and Eighth Amendment rights to detainees is recognized by Exec. Order No. 13491, 74 Fed. Reg. 4893, Sec. 6 (Jan. 22, 2009), and "humane treatment" under Common Article 3 is guaranteed under current Department of Defense Policy, U.S. Dep't of Def. Dir. 2310.01E, DOD Detainee Program (19 August 2014).

<sup>34</sup> See *United States v. Ouimette*, 52 M.J. 691 (C.G.C.C.A. 2000) ("Prisoners' complaints regarding the conditions of their confinement are matters properly within [a military court's] jurisdiction."); *United States v. Palmiter*, 20 M.J. 90, 96-97 (C.M.A. 1985) (Military courts "are ideally suited to review the conditions of pretrial confinement.")

<sup>35</sup> Mr. al Baluchi's Reply to Government Response to Defense Motion to Permit Telephonic Access with Family Members, filed 14 November 2014.

<sup>36</sup> AE321(WBA) Defense Motion to Permit Telephonic Access With Family Members.

<sup>37</sup> AE330(AAA) Defense Motion to Compel Production of Complete, Unredacted Medical Records.

<sup>38</sup> AE206(Mohammad) Motion to Cease Daily Intrusive Searches of Living Quarters and Person.

<sup>39</sup> AE303(MAH) Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Law Standards.

material to these motions on multiple occasions, and the prosecution has simply not provided the responsive discovery.

SOPs, by themselves, may not be presumed to constitute evidence of the day-to-day administration of Camp 7, and may in fact serve to highlight deficiencies when contrasted with actual conditions. From the few SOPs which have been declassified through other means, it is clear that past practices at JTF-GTMO have infringed on established international standards. For example, [REDACTED]<sup>41</sup> indicates that detainee's basic rights were denied as a matter of course,<sup>42</sup> and could be reinstated only when approved by interrogators.<sup>43</sup>

**B. Mr. al Baluchi is entitled to discovery of evidence establishing illegal pretrial punishment.**

Mr. al Baluchi may reasonably challenge his conditions of confinement as illegal pretrial punishment. Mr. al Baluchi is entitled to basic due process under the Fifth Amendment,<sup>44</sup> which includes a prohibition against pretrial punishment.<sup>45</sup> Although Article 13 of the Uniform Code of Military Justice was not specifically incorporated into the Rules for Military Commissions,

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<sup>40</sup> AE254Y(WBA) Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel

<sup>41</sup> See cite 4.

<sup>45</sup> The proposition that the Fifth Amendment prohibits punishment prior to an actual conviction is, of course, long-standing and well-established. *See, e.g. Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”)

this does not negate Mr. al Baluchi's Fifth and Eighth Amendment rights to be free from pretrial punishment.<sup>46</sup>

Mr. al Baluchi's conditions of confinement are a pressing issue in that pretrial punishment allegations may be considered waived if not raised in a timely fashion.<sup>47</sup> Ordinarily, confines in the military justice system are required to demonstrate exhaustion of administrative remedies prior to judicial review of Eighth Amendment violation claims.<sup>48</sup> The prosecutions continued refusal to propound SOPs and other discovery related to confinement conditions precludes any evaluation of precisely what administrative remedies, such as a prisoner grievance system, are available to detainees at Camp 7, as well as what complaints have been previously filed and in what manner those complaints have been addressed or dismissed.

Mr. al Baluchi is also entitled to discovery of confinement conditions which would constitute violations of the Convention Against Torture (CAT).<sup>49</sup> The CAT is clearly a *jus cogens* norm,<sup>50</sup> and violations are properly within the jurisdiction of U.S. courts.<sup>51</sup> Mr. al Baluchi's rights under the CAT include both the right to be free from torture and other cruel, inhuman, and degrading treatment, as well as a right to rehabilitation required by past ill treatment.<sup>52</sup> Mr. al Baluchi is entitled to discovery which could uncover violations under

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<sup>46</sup> See *United States v. McCarthy*, 47 M.J. 162, 164 (C.A.A.F. 1997) ("The question whether a pretrial prisoner is suffering unlawful punishment is of both constitutional and statutory concern.")

<sup>47</sup> *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997); *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993).

<sup>48</sup> *Coffey*, 38 M.J. at 291.

<sup>49</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46 (10 December 1984) (*ratified* by United States, 21 October 1994).

<sup>50</sup> See, e.g., *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1261 (11th Cir. 2012); *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J. concurring).

<sup>51</sup> See *United States v. Struckman*, 611 F.3d 560, 576 (9th Cir. 2010) ("We have suggested that violation of *jus cogens* norms could provide a basis for dismissal under a court's supervisory powers because, like statutory and constitutional laws, they are justiciable in our courts").

<sup>52</sup> Article 14 of the CAT provides in relevant part, "Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and



international humanitarian law, both in terms of his current confinement in and of itself, and when viewed in the context of rehabilitation for the ongoing effects of past mistreatment.

The defense is entitled to specific details about the harsh and ongoing restrictions placed on Mr. al Baluchi, and the manner in which those restrictions were instituted, in order to challenge the conditions as pre-trial punishment. The differentiation between Camp 7 and other detention centers at Guantanamo, or, indeed, other military or civilian prisons, strongly suggests that the motivation behind restrictions at Camp 7 are based primarily on protecting his torturers, rather than legitimate concerns over safety or prison administration. The defense and this commission are entitled to greater detail about the circumstances surrounding these restrictions in order to determine corrective action which may be taken at present, and appropriate credit during sentencing.

**C. Mr. al Baluchi is entitled to discovery of the circumstances under which any past statements were made by himself and other detainees.**

Mr. al Baluchi is entitled to evidence which may be used to rebut or render inadmissible statements which may foreseeably be offered by the prosecution as evidence. Under 10 U.S.C. 948r, any statement obtained through the use of torture *or* “cruel, inhuman, or degrading treatment”<sup>53</sup> is inadmissible before this military commission. The defense is therefore entitled to discovery relating to Mr. al Baluchi’s conditions of confinement during his questioning by the

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adequate compensation, including the means for as full rehabilitation as possible.” CAT General Comment No. 3 ¶ 1, CAT/C/GC/3 (2012) Further, “[the] Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (hereinafter ‘ill-treatment’)...”. Therefore, regardless of whether Mr. al Baluchi’s past mistreatment is determine to rise to the level of torture as opposed to “merely” ill treatment, he is entitled to rehabilitation at present.

<sup>53</sup> The phrase “cruel, inhuman, or degrading treatment is in turn defined by 42 U.S. Code § 2000dd(d) by reference to the Fifth, Eighth, and Fourteenth Amendments, as well as the United States Reservations, Declarations and Understandings to the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 10, 1984.

FBI and DOD in January of 2007, as well as discovery of other detainees' conditions of confinement during their own questioning.

Mr. al Baluchi is also entitled to such evidence under the Military Commissions Act, which specifically provides broad discovery rights to exculpatory evidence.<sup>54</sup> The circumstances under which Mr. al Baluchi or any other detainees made any inculpatory statements are discoverable in that they may lead to suppression on legal grounds, or, at a minimum, seriously damage the credibility of any such statements. A detailed overview of Mr. al Baluchi and other detainees' confinement conditions are highly relevant to any statements, not merely their treatment immediately prior to or during the period when any statements were. This is particularly relevant given that the government exerts an extraordinary level of control over all aspects of the Camp 7 detainees' lives, even when compared to other incarcerated individuals, and because of the continued effects of past mistreatment on any detainee's mental state then undergoing questioning.

**D. Mr. al Baluchi is entitled to discovery which may be used in mitigation at trial.**

The government should produce all confinement records because a capital defendant's behavior while confined is always a key issue in a capital trial. Mr. al Baluchi is explicitly entitled to present mitigation evidence under the Rules for Military Commissions (RMC),<sup>55</sup> and as the Supreme Court explained in *Skipper v. South Carolina*, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing."<sup>56</sup> Thus, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature

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<sup>54</sup> 10 U.S.C. § 949j(d).

<sup>55</sup> See RMC 1001(a)(1)(B) & (c)(1)(B); see also RMC 701, requiring production of all evidence "material to the preparation of the defense."

relevant to the sentencing determination.”<sup>57</sup> Mr. al Baluchi’s Fifth and Eighth Amendment right to introduce evidence of his good behavior in custody reaches the entire “period between apprehension and trial,”<sup>58</sup> including his imprisonment prior to Guantanamo Bay.

Specific details as to Mr. al Baluchi’s prolonged detention in isolation as well as the long-term impact of past mistreatment are clearly mitigating factors to be considered during potential sentencing. Mr. al Baluchi’s environment over the past decade, as well as his interactions with authorities as described in complaints or administrative documents are also highly relevant to an evaluation of potential future dangerousness.

**F. Mr. al Baluchi is entitled to discovery necessary for expert preparation.**

Penological experts will be required for a complete and comparative analysis of Mr. al Baluchi’s confinement conditions. Prisoners’ rights claims require either directly or indirectly addressing whether challenged detention policies have a legitimate and rational basis. The judicial standards applied to pretrial punishment and Eighth Amendment violations in custody rely upon subjective determinations by prison officials on complex and interrelated issues. Indeed, the Supreme Court has framed such decisions as a matter of “expert judgment.”<sup>59</sup>

The defense, therefore, must rely upon experts in addressing and rebutting the bases of such decisions. Expert analysis is required for such topics as comparisons to other military and civilian detention facilities, potential alternatives to current policies, and ramifications of

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<sup>56</sup> 476 U.S. 1, 5 (1986).

<sup>57</sup> *Id.* at 7; *see also Ayers v. Belmonte*, 549 U.S. 7, 475 (2006) (“And just as precrime background and character (*Boyde*) and postcrime rehabilitation (*Payton*) may “extenuat[e] the gravity of the crime,” so may some likelihood of future good conduct count as a circumstance tending to make a defendant less deserving of the death penalty.”).

<sup>58</sup> *United States v. Mason*, 966 F.2d 1488, 1497 (D.C. Cir. 1992). The right to introduce *Skipper* evidence even reaches post-sentencing good conduct. *See Davis v. Coyle*, 475 F.3d 761, 774 (6<sup>th</sup> Cir. 2007); *Creech v. Arave*, 947 F.2d 873, 881-82 (9<sup>th</sup> Cir. 1991).

<sup>59</sup> *Pell v. Procunier*, 417 U.S. 817, 827 (1974).



proposed changes.<sup>60</sup> Any such expert analysis will be speculative and susceptible to challenge if those experts are denied access to complete records of both the policies and administration of Camp 7.

Mr. al Baluchi therefore respectfully requests that this Commission compel production of a complete and unredacted set of the requested SOPs, TSOs, and other materials relating to his conditions of confinement.

7. **Request for Oral Argument:** The defense requests oral argument.
8. **Certificate of Conference:** The government has confirmed that its position is accurately set forth in its 11 April 2014 and 12 June 2014 responses (Attachments D and F, respectively).
9. **Attachments:**
  - A. Certificate of Service
  - B. DR-087-WBA
  - C. DR-159-AAA, filed on SIPR
  - D. Government Initial Response to DR-159-AAA
  - E. DR-159A-AAA
  - F. Government Initial Response to DR-159A-AAA

Very respectfully,

//s//  
JAMES G. CONNELL, III  
Detailed Defense Counsel

Counsel for Mr. al Baluchi

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Detailed Military Counsel

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<sup>60</sup> See, e.g., *Bell v. Wolfish*, 441 U.S. at 535.

# **Attachment A**

**CERTIFICATE OF SERVICE**

I certify that on the 5th day of February, 2015, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

*Learned Counsel*



## **Attachment B**



UNCLASSIFIED//FOR PUBLIC RELEASE

**DEPARTMENT OF DEFENSE**  
**OFFICE OF THE CHIEF DEFENSE COUNSEL**  
**OFFICE OF MILITARY COMMISSIONS**  
**1600 DEFENSE PENTAGON**  
**WASHINGTON, DC 20301-1600**

02 Aug 2013

From: Defense Counsel for Mr. bin Attash, United States v. Khalid Shaikh Mohammad, et al.

To: Trial Counsel

Subj: REQUEST FOR DISCOVERY ICO UNITED STATES v. MOHAMMAD, et al.

Ref: (a) RMC 701  
(b) AE108 – Appropriate Relief to Compel Defense  
Examination of Accused's Conditions of Confinement  
(c) AE133 (WBA Sup) – Supplement to Emergency Defense Motion  
(d) AE144 – Government Notice of Ongoing Command Investigation

1. Defendant, Walid bin 'Attash, by and through counsel, hereby requests that the government produce the document(s) and information listed below. This request is made pursuant to reference (a), the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution.

2. Please produce any and all Standard Operating Procedures (SOP), including any variations, versions, modifications of those procedures, or similar guidance, policies, techniques, etc., relating to the activity and behavior of all Camp Seven detention guards from September 2006 to present. This request specifically includes guidance regarding detention guard interactions with detainees, to include surveillance, oversight, policing and any similar activities.

3. This information is relevant and material to the defense's preparation efforts with respect to the ongoing litigation of all filings under AE108, AE133, and AE144 (See references b, c, and d).

4. The defense requests that the government inform the defense counsel if it does not intend to comply with any of the provisions of this request. This includes a refusal to produce any documents or information based upon classified status. *See* reference a. You need not duplicate any requested information that has already been provided to the defense; simply note that fact in your response. The defense requests a formal written response that coordinates with the specific request made herein.

5. The defense expects that the government will make a reasonably diligent effort to comply with this information request. As such, the defense will regard any non-response or response without comment as an affirmative assertion by the government that the requested information does not exist. *United States v. Green*, 37 M.J. 88, 89 n.2 (CMA 1993).

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DR-087-WBA

Filed with TJ  
5 February 2015

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6. This is a continuing request and as such, this request includes any information that you may later discover before, during, or after the trial of this case. RMC 701(i); *See United States v. Brickey*, 16 M.J. 258 (CMA 1983).

//s//  
\_\_\_\_\_  
CHERYL T. BORMANN  
Learned Counsel

//s//  
\_\_\_\_\_  
JAMES E. HATCHER  
LCDR, JAGC, USNR  
Defense Counsel

//s//  
\_\_\_\_\_  
MICHAEL A. SCHWARTZ  
Capt, USAF  
Defense Counsel

//s//  
\_\_\_\_\_  
TODD M. SWENSEN  
Capt, USAF  
Defense Counsel

# **Attachment**

## **Classified document**

~~**SECRET**~~

## **Attachment D**





OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

1 April 2014

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Initial Response to 19 March 2014  
Request for Discovery (DR-159-AAA)

1. The Prosecution received the Defense request for discovery on 19 March 2014. The Prosecution hereby responds to the Defense request.
2. The Defense requests information in paragraph one (1) portion marked as (S//NF) by the Defense, as well as additional requests contained in paragraph two (2) portion marked as unclassified. The Prosecution responds as follows, in bold:

**The Prosecution is currently conducting its due diligence with respect to the discovery request submitted on 19 March 2014. The Prosecution will respond accordingly upon completion of its due diligence.**

Respectfully submitted,

//s//

Michael J. Lebowitz  
Captain, JA, USA  
Assistant Trial Counsel

## **Attachment E**



**DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620**

6 June 2014

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III, Detailed Learned Counsel for Ammar al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY (Camp 7 conditions)

Pursuant to 10 U.S.C. § 949j, RMC 701, the Geneva Conventions, and the Due Process Clause of the Fifth Amendment to the United States Constitution, Mr. al Baluchi through counsel requests the government produce the following in discovery:

Documents or information, including but not limited to memoranda, directives, or emails, regarding the segregation of so-called "high-value detainees" from other internees at Guantanamo Bay Naval Station.

Thank you for your attention in this matter. If you have any questions regarding this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s//

James G. Connell, III

DR-159A-AAA  
2014-06-06

## **Attachment F**



OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

12 June 2014

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 6 June 2014 Request for  
Discovery (DR-159A-AAA)

1. The Prosecution received the Defense request for discovery on 6 June 2014. The Prosecution hereby responds to the Defense request.
2. The Defense requests production of "memoranda, directives, or emails, regarding the segregation of so-called "high-value detainees" from other internees at Guantanamo Bay Naval Station." The Prosecution responds as follows, in bold:

**The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.**

**Further, the Defense has access to the actual conditions of confinement of their client pursuant to the order of this Commission in AE 108J.**

**As such, the Prosecution respectfully declines to produce the requested material.**

Respectfully submitted,

//s//

Nicole A. Tate  
Assistant Trial Counsel